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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff and Respondent, v. HAIGHT-ASHBURY NEIGHBORHOOD COUNCIL, Defendant and Appellant.	A133514 (San Francisco County Super. Ct. No. CUD-11-637573)

For many years the Haight-Ashbury Neighborhood Council (the Council) has operated a recycling center on Frederick Street within San Francisco's Golden Gate Park. In 2011 the City and County of San Francisco (the City) terminated the Council's tenancy and brought an unlawful detainer action when it refused to vacate. The City successfully sought summary adjudication of its claim for possession and the Council's affirmative defenses of discriminatory and retaliatory eviction. The Council now appeals from a final judgment entered on the grant of summary adjudication after the City dismissed its claims for damages. We affirm.

BACKGROUND

It is undisputed that the Council's fixed-term lease expired in 2001, after which it continued in possession of the recycling center as a periodic tenant. It is also undisputed that the Council refused to vacate the premises after the City terminated its tenancy in the spring of 2011. Rather, the parties disagree whether the Council raised a triable issue of fact that its eviction was illegal discrimination against its homeless clientele or in

retaliation for criticizing Lieutenant Governor Gavin Newsom, who was then the City's mayor, and opposing his positions on various public issues. In addition, The Council contends it was error for the court to hear the City's motion on shortened notice and protect the lieutenant governor from deposition.

The following evidence was before the court on summary judgment. The Council has operated the recycling center since the 1970's. After its lease expired in 2001, the Council continued to operate the center under either a quarter-to-quarter (according to the City) or year-to-year (the Council's view) holdover tenancy.[1]

Throughout the duration of the Council's tenancy, the City Recreation and Parks Department (Rec & Park) received a steady stream of complaints from local residents and neighborhood groups about noise, traffic and safety issues emanating from the recycling center. Neighborhood groups and City officials were also concerned that on-site cash redemption for recyclables at the Council site contributed to a cycle of substance abuse and illegal camping in Golden Gate Park.

The Golden Gate Park master plan identifies the recycling center as a non-conforming use within the park. Early in 2010, Rec & Park staff began meeting with community groups to discuss alternative uses for the recycling center site, including a community garden. Staff then began work on the design, funding and implementation of a community garden at the Frederick Street location, and presented a plan for the garden to the mayor's staff on April 30, 2010. In June Rec & Park met with the mayor's office about trash, noise and illegal activity related to recycling centers in the City, including the Council site.

Also in June, Mayor Newsom submitted an ordinance that would restrict sitting or lying on public streets (commonly known as "Sit/Lie") for consideration on the November 2010 ballot. Rec & Park's director of policy and public affairs attested that

[1] The difference is not material on this appeal, as the Council does not dispute that the City gave adequate notice of termination.

Sit/Lie was not discussed in any conversations about the recycling center and was not a factor in Rec & Park's decision to terminate the Council's tenancy.

On December 2, 2010, the City Recreation and Park Commission unanimously approved the staff recommendation for a community garden at the Council's Frederick Street site. The City served notice to terminate the Council tenancy on December 4, but subsequently rescinded it after the Council asserted the notice term was inadequate.

Mayor Newsom was sworn in as Lieutenant Governor in January 2011. After that, the Council representatives met with San Francisco's new mayor, Hon. Ed Lee, to urge him to retain the recycling operation at the Frederick Street site. Its efforts were unsuccessful, and in May the City issued a new notice of termination effective June 30. The Council did not vacate, and the City filed this unlawful detainer action seeking eviction and damages for fair rental value since July 1, 2011. The Council asserted as affirmative defenses that the eviction was in retaliation for its exercise of First Amendment rights and constituted unlawful discrimination against the homeless.[2]

The Council noticed Lieutenant Governor Newsom's deposition to be taken six days before the trial date. The City moved for a protective order on the ground, inter alia, that the Council had not identified a compelling reason to depose him, and moved for summary adjudication on its cause of action for possession of the premises and each of the Council's affirmative defenses. The City argued the Council could not show that its eviction was in retaliation for its opposition to the former mayor's policies because the City had been planning for an alternative use of the Frederick Street site *before* the Council publicly criticized Newsom and his policy positions. Moreover, the City issued

[2] The Council also alleged its eviction would violate an unspecified state law that required the City to provide a suitable replacement for the recycling center, and that the City had failed to obtain an environmental impact report or make a negative declaration. The trial court granted summary adjudication as to both of these affirmative defenses, and the Council does not contest those rulings on appeal.

the operative termination notice four months *after* Mayor Lee replaced Newsom in the mayor's office.

The court granted the City's motion for a protective order and prohibited the Council from deposing Lieutenant Governor Newsom. At the hearing on its summary adjudication motion, the City waived its claim to monetary damages and the court granted it summary adjudication on the claim for possession and all of the Council's affirmative defenses, thus disposing of the entire action. The court explained that "there is no evidence beyond mere speculation that the City terminated [the Council's] tenancy in retaliation for any protected conduct on the part of [the Council]. To the contrary, the City put forth uncontradicted evidence that it filed this action for the legitimate purpose of implementing City policy on the Premises and evicting a tenant who was illegally occupying the Premises despite no longer holding a lease to that property. Moreover, this defense failed to raise a triable issue of fact as to whether Lieutenant Governor Gavin Newsom influenced this policy decision." Furthermore, the Council "failed to present any evidence beyond mere speculation in support of [its discrimination] defense, failed to make the required legal showing, and failed to otherwise raise a triable issue of material fact as to any element of this affirmative defense."

The Council filed this timely appeal from the ensuing judgment and successfully moved for a stay pending appeal.

DISCUSSION

Legal Standards

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The court must grant summary judgment if all the papers submitted by the parties show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code

Civ. Proc., § 437c, subd. (c).) A plaintiff who moves for summary judgment must prove each element of the causes of action. The burden then shifts to the defendant to show the existence of one or more triable issues of material fact as to those causes of action or defenses. (Code Civ. Proc., § 437c, subd. (p)(1).)

"The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1321.)

Our review from a grant of summary judgment is de novo, and we resolve all doubts in favor of the party opposing the judgment. (*M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 703–704.)

The City Established That Council Cannot Support Its Retaliatory Eviction Defense

"In unlawful detainer actions, tenants generally may assert legal or equitable defenses that 'directly relate to the issue of possession and which, if established, would result in the tenant's retention of the premises.' [Citation.] The defense of retaliatory eviction . . . is one such defense. This defense bars a landlord from recovering possession of the dwelling in an unlawful detainer action where recovery is 'for the purpose of retaliating' against the tenant because of his or her lawful and peaceable exercise of any rights under the law [citation] or 'because of' his or her complaints regarding tenantability." (*Drouet v. Superior Court* (2003) 31 Cal.4th 583, 587.) Whether or not the landlord's motive was retaliatory ordinarily raises a factual question, but if the landlord establishes a legitimate explanation for its action on summary judgment the court must then consider the tenant's showing to determine if a triable issue of fact exists.

(*Rich v. Schwab* (1984) 162 Cal.App.3d 739, 744; see *Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610.) The Council claims that its evidence established the existence of disputed facts that require trial on its retaliatory eviction defense. We disagree.

The City presented evidence that it terminated the Council's tenancy to convert the site to a community garden, and that planning for the garden began long before the Council engaged in the protected speech that it claims motivated the eviction. The City was exploring alternative uses for the site by January of 2010, after years of community discontent with the recycling center and related health and safety concerns. By the spring of 2010, Rec & Park was discussing the concept of a community garden with neighborhood groups and the mayor's office and working on its preliminary design, funding and implementation. The criticism of Newsom appeared in a newspaper article dated July 9, 2010, and the Council's opposition to "Sit/Lie" appeared in the ballot handbook sent to voters for the November 3, 2010 election. The City's plan to replace the recycling center with a community garden was thus underway before the Council criticized then–Mayor Newsom and his policies, and therefore could not have been based on his desire to retaliate for its criticism.

The Council disagrees. Despite this undisputed chronology, it maintains that "there is no evidence of a pre-existing intention to evict the tenant before the act that gave rise to the retaliation." According to the Council, while the City's evidence demonstrates a "pre-existing *motivation*" to evict the Council from the site, there is no evidence of a "pre-existing *intention*" (emphasis added in both quotes) to evict it until after the ballot handbook was published and the criticism of Newsom appeared in the newspaper. The purported distinction is unpersuasive.

Whether we call the City's reasons a "motive" or an "intent," the consequence is the same: the City established that it decided to replace the Council's recycling operation well *before* the activity for which the Council alleges retaliation. The Council's theory

that the City's initial valid motives for this decision were later supplanted or superseded by then–Mayor Newsom's intent to punish it for criticizing him and his policies is factually unsupported and nonsensical. " 'An issue of fact can only be created by a conflict of evidence. It is not created by "speculation, conjecture, imagination or guess work." [Citation.] Further, an issue of fact is not raised by "cryptic, broadly phrased, and conclusory assertions" [citation], or mere possibilities [citations],' or by allegations in the complaint." (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1014 (*Lyons*); *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116, disapproved on another ground as recognized in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41–42.) Evidence that Rec & Park previously considered a different location for a community garden or that Rec & Park's general manager told the Council there were no plans to evict it some two months before the commission approved the community garden plan for the Council site does not contradict the evidence that the City was working on and toward that plan long before the Council criticized the mayor's policies.

The Council's retaliation claim fails for another reason as well: its tenancy was not terminated by Mayor Newsom. Newsom left the mayor's office in January 2010, and the operative eviction notice was issued by Mayor Lee's administration after meetings between Mayor Lee and the Council. Even so, the Council postulates that the decision was nonetheless Newsom's because there is "every reason to assume that the bureaucratic machine just continued with what it was instructed to do by Mayor Newsom." This, too, is mere conjecture — and is contradicted by evidence that Mayor Lee met with the Council representatives to discuss its occupancy. It is therefore inadequate to defeat summary adjudication of the Council's retaliatory eviction defense. (*Lyons, supra,* at p. 1014.)

The Council Produced No Evidence of Unlawful Discrimination

The Council also contends its eviction constitutes unlawful discrimination on the basis of status, because it raised a triable issue of fact that one of the City's principal motivations was to rid the Golden Gate Park area of the Center's homeless clientele. Here, too, we disagree. Assuming arguendo that homelessness qualifies as a protected status for purposes of discrimination analysis, an issue we need not decide (see *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1105 (*Tobe*)), the Council adduced no evidence that the City's decision to terminate the recycling center, even to the extent based on its use by homeless persons, was motivated by discriminatory animus rather than concerns for public health and safety. (See *ibid*.)

The undisputed evidence showed that the City's concerns were based on such valid considerations. The Council itself relies on the following testimony from Rec & Park's general manager: "Q. . . . How does [replacing the recycling center] increase public safety? [¶] A. We believe that it is a healthier use in the park; the eastern end of the park has had public health and public safety challenges. And that by discontinuing cash redemption in the park, we are probably increasing the health and, overall health and safety of uses within the park. [¶] Q. I guess you're a city official, so you have to be euphemistic, but are you basically talking about the homeless people and the street people from Haight Street who come and redeem? [¶] A. I'm not sure I'm prepared to characterize it one way or the other. But there are people who actually live in Golden Gate Park, on the eastern end, that frequently do redeem at the center because it is located in Golden Gate Park. And we have had, the City has had a number of concerns for a long period of time about the health and safety of some of the people that are living in the park. There have been a number of incidents in which both victims and perpetrators of serious crimes have been people that have been living in the park and have been people that have, that may be redeeming on the site." This testimony does not support the Council's claim of status-based discrimination. It undermines it. A 2008 internal memo

to then–Mayor Newsom that inquired whether he wanted to close the recycling center or, alternatively, prevent homeless customers from using it, adds nothing to the Council's discrimination claim. There is nothing about the context of the memo that indicates it is motivated by discrimination against the homeless rather than concern over health and safety issues due to the center's operation.

Moreover, the City also had reason to evict the recycling center that had nothing to do with the incentive it provided for homeless to camp in the park and neighborhood. The recycling center is a non-conforming use under the 1998 Golden Gate Park Master Plan, and its utility to local residents has largely been supplanted since the initiation of curbside recycling pickup.[3] It has been the City's policy for years to promote health and nutrition by providing residents with community gardens, and to that end both its general plan and its sustainability plan called for the expansion of community garden opportunities throughout San Francisco. On the other hand, neighbors had complained for years that the recycling center encouraged illegal poaching from curbside recycling bins and trash cans and was a source of noise, truck traffic, and litter.

The Council therefore failed to show a triable issue of material fact as to its discrimination defense, and the trial court properly granted summary adjudication.

The Court Did Not Abuse Its Discretion in Issuing the Protective Order

The Council argues the court abused its discretion when it protected Lieutenant Governor Newsom from deposition. It asserts Newsom's testimony was critical because his state of mind and reasoning were relevant to the Council's retaliation and discrimination defenses, and that "[t]he extent to which he was the ultimate decision-maker, as well as his state of mind, is a legitimate subject of discovery which could have only been obtained through his testimony." The contention is meritless.

[3] By November 2010, the recycling tonnage collected at the recycling center accounted for only about one tenth of one percent of the City's total landfill diversion.

"It is the general rule in both California and federal courts that the heads of agencies and other top governmental executives are normally not subject to depositions. [Citations.] [¶] 'An exception to this general rule exists concerning top officials who have direct personal factual information pertaining to material issues in an action. [Citations.] [¶] *A top governmental official may, however, only be deposed upon a showing that the information to be gained from such a deposition is not available through any other source. [Citations.]'* [¶] . . . [¶] The general rule is based upon the recognition that '. . . an official's time and the exigencies of his everyday business would be severely impeded if every plaintiff filing a complaint against an agency head, in his official capacity, were allowed to take his oral deposition. Such procedure would be contrary to the public interest, plus the fact that ordinarily the head of an agency has little or no knowledge of the facts of the case.' [Citation.] This proposition is as true in California courts as in federal courts." (*Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1467–1468, italics added; *State Board of Pharmacy v. Superior Court* (1978) 78 Cal.App.3d 641, 644–645 ["A highly placed public officer should not be required to give a deposition in his official capacity in the absence of '*compelling reasons*.' "].)

Here, the Council made no showing that the information it sought to obtain from Lieutenant Governor Newsom could not have been obtained through other means, such as deposing the most knowledgeable persons on Newsom's staff or within Rec & Park or conducting written discovery of communications between Newsom and City and/or Rec & Park staff bearing on the decision to terminate the Council's tenancy. The court's decision to issue the protective order was well within its discretion.

The Council Was Given the Required Notice to Oppose the City's Motion

Finally, the Council argues reversal is necessary because the City served its motion papers only five days before the hearing. We again disagree. Section 1170.7 of the Code of Civil Procedure and rule 3.1351 of the California Rules of Court authorize a

five-day notice period for summary judgment motions in wrongful detainer actions.[4] The Council maintains, as it did below, that this shortened notice provision was inapplicable because the City moved for summary adjudication, not summary judgment, and no rule or statutory provision shortens notice for summary adjudication motions. Perhaps, but in this case any error was harmless because the City waived its claim for monetary damages, the only claim not addressed by its summary adjudication motion. Accordingly, the subsequent ruling and judgment disposed of the entire action, just as though the City had initially styled its motion as one for summary judgment.

The Council asserts, without any factual or legal support, that it was disadvantaged by the shortened notice because "[i]n general, motions for summary judgment are easier to defeat and take less time to oppose [than] motions for summary adjudication." But there is no reason to believe that *this* motion would have been any easier to defeat had it been filed as a motion for summary judgment, rather than summary adjudication. In that case, the City would have pursued all of the arguments it raised in relation to its cause of action for possession and the Council's affirmative defenses, but it also would have sought judgment on its claim for monetary damages (thereby disposing of the entire action). Doing so would have created more work for the Council, not less.

"No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const. art. VI, § 13.) The Council was not

[4] Under Code of Civil Procedure section 1170.7, "a motion for summary judgment may be made at any time after the answer is filed upon giving five days notice. Summary judgment shall be granted or denied on the same basis as a motion under Section 437c." California Rules of Court, rule 3.1351 provides that "[i]n an unlawful detainer action . . . , notice of a motion for summary judgment must be given in compliance with Code of Civil Procedure sections 1013 and 1170.7."

prejudiced by the shortened notice period, so the procedural error, if any, does not warrant reversal.

DISPOSITION

The judgment is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.